DEPARTMENT OF STATE REVENUE

04-20120425.LOF

Letter of Findings: 04-20120425
Sales/Use Tax
For the 2009 Tax Year

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax – Claiming Horses.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-1-27; IC § 6-2.5-5-1; IC § 6-2.5-5-8; 71 IAC 6.5-1-1; 71 IAC 6.5-1-2; 71 IAC 6.5-1-4; 45 IAC 2.2-3-4; 45 IAC 2.2-5-5; Sales Tax Information Bulletin 20, (October 2009); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of use tax on a claimed horse.

II. Tax Administration – Imposition of Negligence Penalty.

Authority: IC § 6-8.1-10-2.1, 45 IAC 15-11-2.

The Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on a horse that he acquired in a "claiming" transaction that occurred at an Indiana racetrack. Given that Taxpayer had not paid sales tax, the Department issued a proposed assessment for use tax, interest, and penalty. Taxpayer filed a protest regarding the proposed assessment. An administrative hearing was held and this Letter of Finding ensures. More facts will be provided below as needed.

I. Use Tax – Claiming Horses.

DISCUSSION

The notice of proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department found that Taxpayer purchased a horse in Indiana by means of a "claiming transaction." Regarding "claiming" and horse racing, 71 IAC 6.5-1-1, states in part:

(a) A person entering a horse in a claiming race warrants that the title to the horse is free and clear of any existing claim or lien, either as security interest mortgage, bill of sale, or lien of any kind; unless before entering the horse, the written consent of the holder of the claim or lien has been filed with the stewards and the racing secretary and its entry approved by the stewards. A transfer of ownership arising from a recognized claiming race will terminate any existing prior lease for the horse.

(b) Title to a claimed horse shall be vested in the successful claimant at the time the horse leaves the starting gate and is declared an official starter. The successful claimant shall then become the owner of the horse whether it be alive or dead, sound or unsound, or injured at any time, during the race or after. However, the successful claimant may request on the claim blank at the time the successful claimant makes the claim that the horse be tested for the presence of equine infectious anemia via a Coggins test, or other test as approved by the official veterinarian. Should this test prove positive, it shall be cause for voiding the claim. The expense of the test and the maintenance of the horse during the period requested for the test shall be the responsibility of the successful claimant, unless the test proves positive, wherein the owner or owners of the horse at the time of entry shall be responsible.

(Emphasis added).

71 IAC 6.5-1-2 states:

(a) Any horse starting in a claiming race is subject to be claimed for its entered price by any:

(1) licensed owner; or
(2) holder of a valid claim certificate; or
(3) licensed authorized agent acting on behalf of an eligible claimant.

(b) Every horse claimed shall race for the account of the original owner, but title to the horse shall be transferred to the claimant at the time the horse leaves the starting gate. The successful claimant shall become the owner of the horse, regardless of whether it is alive or dead, sound or unsound, or injured prior to, during, or after the race.

71 IAC 6.5-1-4(h) states:

For a period of thirty (30) days after a claim, a horse shall not start in a race in which the determining eligibility price is less than the price at which it was claimed. The day claimed shall not count for purposes of counting the applicable thirty (30) day period, and for this purpose the immediate following calendar day after

the day claimed shall be the first day. The horse shall be entitled to enter whenever necessary so that the horse may start on the thirty-first calendar day following the claim for any claiming price.
(Emphasis added).

Claiming races are a method of determining the price of a horse, with the successful claimant taking title to the horse "at the time the horse leaves the starting gate and is declared an official starter." Taxpayer was the claimant of a horse that was raced in claiming races. The Department assessed tax based upon the claiming amount paid by Taxpayer for the horse.

Turning to Indiana sales and use tax law, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-2-1 states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Use tax is imposed by IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, 45 IAC 2.2-3-4 further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

The purchase of a horse is subject to Indiana's sales/use tax, since horses are tangible personal property. IC § 6-2.5-1-27, which defines tangible personal property, states:

"Tangible personal property" means personal property that:
(1) can be seen, weighed, measured, felt, or touched; or
(2) is in any other manner perceptible to the senses.
The term includes electricity, water, gas, steam, and prewritten computer software.
(Emphasis added).

The next issue is whether or not the purchase of the horse was exempt in Indiana. IC § 6-2.5-5-1, an exemption statute, states:

Transactions involving animals, feed, seed, plants, fertilizer, insecticides, fungicides, and other tangible personal property are exempt from the state gross retail tax if:
(1) the person acquiring the property acquires it for his direct use in the direct production of food and food ingredients or commodities for sale or for further use in the production of food and food ingredients or commodities for sale; and
(2) the person acquiring the property is occupationally engaged in the production of food and food ingredients or commodities which he sells for human or animal consumption or uses for further food and food ingredient or commodity production.

Additionally, 45 IAC 2.2-5-5 notes:

(a) The raising of saddle horses, harness horses, ponies, donkeys, or any other similar animals not used directly in direct agricultural production does not qualify as agricultural production for "human consumption" under the gross retail sales and use tax act. Consequently, the purchase of supplies, food, materials, and equipment used in raising or maintaining such animals are subject to the sales tax unless the items are directly used or consumed in the production of such animals for resale in the regular course of the purchaser's business.
(b) The purchase of any of the above animals is subject to the sales tax unless the purchaser is a registered retail merchant and is buying such animal for resale in the regular course of his business.
(Emphasis added).

In Taxpayer's case, the horse at issue was a race horse. Thus the race horse does not come within the scope of sales tax exemption found at IC § 6-2.5-5-1 (as noted above, for the exemption to apply the animal has to be for the "direct use in the direct production of food....").

Taxpayer argues that the ownership of the horse can change frequently. The resale exemption is stated in IC § 6-2.5-5-8(b) and states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

To meet the requirements of this statute, Taxpayer must acquire the horse for resale in his ordinary course of business. However, Taxpayer does not purchase horses to simply resell them. The horses are bought for racing purposes, not for resale in the ordinary course of Taxpayer's business. Also, an owner that purchases a race horse by means of a claiming race could decide not to race the horse again (in that potential scenario, the horse would not be resold).

The Department also notes that the purchase of the horse by means of a claiming race at an Indiana horse racing track does not meet the requirements of a casual sale outlined in Sales Tax Information Bulletin 20, (October 2009), 20091125 Ind. Reg. 045090898NRA. The horses are bought at the horse track in a retail transaction, not at the residence of a prior horse owner.

At the hearing, Taxpayer stated that he now understands why, as a matter of law, horse claiming transactions should be subject to sales/use tax, and pointed out that all surrounding states do subject these transactions to sales tax. Taxpayer's complaint, however, is that for all the years since horse racing came to Indiana, these transactions have not been subjected to tax. Taxpayer states that it is, therefore, not fair for the Department to now impose this tax, especially given that the overall price of the transaction is raised without the claimant having been given notice of the full cost of the transaction. The Department acknowledges Taxpayer's complaint, but points out that the law is, in this instance, clear and that the claiming transaction is properly subjected to tax.

In conclusion, Taxpayer purchased a race horse at a claiming race; Taxpayer failed to pay sales tax at the time of purchase. Thus use tax was properly assessed by the Department.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Imposition of Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
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> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
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> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has demonstrated that he met his burden to show that he had reasonable cause not to pay sales tax, or remit use tax, on the claiming transaction at issue.

FINDING

The Taxpayer's protest of the negligence penalty is sustained.

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